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## Capacity to Marry in the Conflict of Laws: Some Variations on a Theme

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Problems of matrimonial capacity in the conflict of laws have traditionally been said to be resolved through a distributive application of the two personal laws in presence — to each his or her own law.<sup>1</sup> Yet the proponents of this “dual domicile doctrine” have met strong opposition from those who would recognize a paramount interest on the part of the State wherein the marriage is to be fixed, rather than that from which the parties may have come, in determining its validity. Savigny in Germany,<sup>2</sup> Bartin in France,<sup>3</sup> Cook in the U.S.A.,<sup>4</sup> and Cheshire<sup>5</sup> in England have most vigorously advanced the case for application of the law of the intended matrimonial home, but they have been far from alone in advancing such arguments.<sup>6</sup> Two recent decisions moreover — one

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1. The tradition is that of Commonwealth jurisdictions over the last century and of most Continental European States, the latter defining the personal law in terms of nationality. Problems do arise, however, with respect to prohibitions formulated expressly or impliedly in terms of the characteristics of the *other* spouse. See text, *infra*, at . Exceptions to the basic rule also exist. See A. V. Dicey and J. H. C. Morris, *The Conflict of Laws* (9th ed. London: Stevens and Sons, 1973) Rule 34 [hereinafter “Dicey and Morris”]

2. F. Savigny, *A Treatise on the Conflict of Laws*, trans. W. Guthrie (1st ed. Edinburgh: T. & T. Clark, 1869) at 240 (expressed in terms of a presumption in favour of the husband’s domicile)

3. 2 Bartin, *Principes de droit international privé* (Paris: Domat-Montchrestien, 1932) at 123 (in principle, the husband’s personal law which, in the Continental perspective, is the husband’s national law. For a decision in this sense, see Trib. Montpellier, *Arnero* March 18, 1920, S. 1921. 2.11, Clunet 1920. 633)

4. W. Cook, *The Logical and Legal Bases of the Conflict of Laws* (Cambridge: Harvard University Press, 1942) at 447-48

5. G. Cheshire, *Private International Law* (7th ed. London: Butterworths, 1965) at 276 ff.

6. See, e.g., though in some cases with modifications, C. Schmitthoff, *The English Conflict of Laws* (3rd ed., 1954) at 312-13; E. Sykes, *The Essential Validity of Marriage* (1955), 4 I.C.L.Q. 159 at 168; P. Maddaugh, *Validity of Marriage and the Conflict of Laws* (1973), 23 U.T.L.J. 117 at 136; B. Audit, *La Fraude à la loi* (Paris: Dalloz, 1974) at 35, 284 (who considers the interest of the law of the matrimonial domicile to become increasingly dominant as the years pass after celebration of the marriage). Recent formulations of both United States and German law on this subject admit the relevance of changes of domicile or nationality after celebration of the marriage (*Statutenwechsel*), without limiting the

from England<sup>7</sup> and one from Ontario<sup>8</sup> — have provided further support for their theories. The purpose of this note is not to restate well known arguments in favour of either position but rather to explore briefly a possible *via media* between the two. The thesis to be defended is that what have been seen generally as competing and contradictory theories may in fact be able to work together in some harmony, permitting effective recognition of the interests involved without creating intolerable conditions of uncertainty.

Essential to the proposition to be advanced is the idea that there *are* circumstances in which it is clear that the parties, on marrying, have deliberately and clearly severed themselves from previous jurisdictional attachments. The clearest case is the marriage celebrated to facilitate the departure of both persons from a jurisdiction hostile to them, followed by fixed and permanent settlement elsewhere. Less radical but still easily discernible efforts to “begin a new life” are frequent. In all such cases the argument has regularly and, it is felt, convincingly been made that it is artificial and improper to make application of a law or laws which have never had and are unlikely to have any real connection with the marriage.<sup>9</sup> In such cases the jurisdiction whose laws are most competent to pronounce on the validity of the marriage is that in which the matrimonial home is established and in which the parties live as man and wife.

The major obstacle to adoption of the theory of the intended matrimonial home, which would adequately respond to these situations as well as to the more frequent one of the parties simply settling in an existing domicile, has been uncertainty as to its application in a number of perhaps statistically insignificant but easily envisaged situations. The theory is thought of generally as requiring application of the law of the *intended* matrimonial home. What if the parties have no such intention? What if the intention is

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discussion to changes from pre-existing personal laws to those first acquired after celebration. The American Law Institute, 2 *Restatement 2nd Conflict of Laws* (St. Paul: A.L.I. Publishers, 1971) s. 283 at 240; 3 *Staudingers Kommentar zum Bürgerlichen Gesetzbuch, E.G.B.G.B.*, (10th & 11th ed. Berlin: J. Schweitzer Verlag, 1973) at 201-10, 345-46 [hereinafter “*Staudingers Kommentar*”]. See also *infra*, note 26

7. *Radwan v. Radwan* (No. 2), [1973] Fam. 35; [1972] 3 W.L.R. 939; [1972] 3 All E.R. 1026

8. *Feiner v. Demkowicz* (1973), 2 O.R. (2d) 121; 42 D.L.R. (3d) 165; 14 R.F.L. 27 (H.C.)

9. See the writers cited *supra*, notes 2-6

unfulfilled at the time of litigation? In response to these questions, and admitting the force of the argument that status cannot be affected by intention or will alone, as perhaps in the case of contract, advocates of the intended matrimonial home theory agree that the intention must be fulfilled if the law of that jurisdiction is to apply. Absent such intention, or absent fulfillment of it, we are told to rely simply on the law of the husband's domicile at the time of celebration, as being the jurisdiction wherein marriages generally come to be located.<sup>10</sup> To the criticism of uncertainty is now added, with great force in to-day's world, that of sexual discrimination.<sup>11</sup>

What therefore seems required is a non-discriminatory, realistic, alternative solution for the case in which, at the time of litigation, it is not clear that the parties have clearly severed their marriage from their pre-existing personal laws. Such a solution, it is suggested, is to be found in the dual domicile theory itself, application of which is perfectly justifiable in all cases in which the actual interest of States to control the marriages of their domiciliaries has not been displaced through a clear localization of the marriage elsewhere. Capacity to marry should therefore be governed by the law of the first common domicile established after celebration of the marriage or, failing such domicile, by the personal law of each party at the time of celebration of the marriage.

This formulation, it is realized, places less emphasis on the intention of the parties at the time of marriage but, if one accepts that status cannot be affected by intention alone, it is difficult to see how such intention acquired the importance it did in the usual formulations of the theory of the matrimonial home. If the parties had decided, at the time of celebration, to live elsewhere, this would certainly be an element in deciding against the application of the law of the husband's domicile (as the presumptive matrimonial home), but an element of very considerably less importance than the fact that they actually did go and live elsewhere. It is the actual *situs* of the marriage which is fundamental, not the preliminary musings of the parties to it. Thus, if there is no clear proof as to pre-existing intention, this should not, it is felt, prevent application of the law of the place where the parties do in fact settle. Or if the intention changes at the time of celebration or immediately thereafter,

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10. *Supra*, notes 2-5

11. See Dicey and Morris, *supra*, note 1 at 261; G. Cheshire and P. North, *Private International Law* (9th ed. London: Butterworths, 1974) at 339

execution of the new intention should outweigh the importance of that which has been abandoned.<sup>12</sup>

How would such a rule operate in the marginal cases wherein the theory of the intended matrimonial home has been criticized? If the challenge to a party's capacity to marry should intervene prior to the celebration or prior to establishment of the matrimonial home — either because its establishment was delayed by a long honeymoon,<sup>13</sup> or because the marriage simply dissolved prior to its establishment<sup>14</sup> — the existing personal laws, not having been clearly displaced, would continue to receive distributive application. Only in the case where, at the moment of adjudication, it could be clearly established that a breaking away from previous attachments had taken place, would the law of the new matrimonial home receive application.

Three patterns for the establishment of a matrimonial home are evident. The first is that in which the pre-existing domiciles are different, and the matrimonial home is established in one or the other of them. She follows him or he follows her. An example of such a case is *Radwan v. Radwan (No. 2)*<sup>15</sup> in which, the parties having intended to establish and having in fact established the matrimonial home in the husband's domicile by the time of litigation, Cumming-Bruce J. applied the law of that jurisdiction to the problem of the wife's capacity to enter into a polygamous marriage, and upheld the marriage. The same case also indicates the clear likelihood of the reverse pattern — the parties establishing themselves in the state of the wife's pre-existing domicile — since the parties did eventually re-establish their domicile in England, the place of the wife's pre-existing domicile.

Again, it may be the case that the pre-existing domiciles are different and that the parties choose to establish themselves in a third, new state. Or, finally, it may be that there is an existing common domicile but that the parties have decided to abandon that

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12. See, to this effect, Maddaugh, *supra*, note 6 at 136

13. As in *Radwan v. Radwan (No. 2)*, [1973] Fam. 35 at 40; [1972] 3 W.L.R. 939 at 941; [1972] 3 All E.R. 1026 at 1029

14. For such a *mariage éclair*, see *Zoldest v. Zoldest* (1973), 42 D.L.R. (3d) 316; [1974] 2 W.W.R. 572; 13 R.F.L. 398 (B.C. S.C., T.D.). Early dissolution could also be caused by death shortly after celebration or even by death before celebration, in the event of a posthumous marriage, as in the Belgian decision of the Trib. civil d'Arlon, January 16, 1973, *Revue critique de droit international privé* 1974. 322

15. [1973] Fam. 35; [1972] 3 W.L.R. 939; [1972] 3 All E.R. 1026

state in favour of another, usually a country of immigration. Such was the pattern of fact in the recent Ontario case of *Feiner v. Demkowicz*.<sup>16</sup> The parties, aunt and nephew, were both domiciled in Poland and went through a form of marriage in Poland in order to facilitate the aunt's departure from the country. It was the intention of the parties to establish themselves in Canada as soon as they could emigrate, and they did subsequently so establish themselves, in Ontario. Aunt-nephew marriages being within the prohibited degrees of Ontario law, Madam Justice Van Camp annulled the marriage on that ground. She did so, however, not by expressly adopting the theory of the intended matrimonial home — though stating that “. . . if this theory is valid, it would apply to the parties to this action”<sup>17</sup> — but rather by deciding that there had been insufficient evidence of contrary dispositions of Polish law and by applying the presumption — admitted to be criticized — that in the absence of adequate proof foreign law shall be presumed to be the same as that of the forum.<sup>18</sup> The proof offered was in fact deficient,<sup>19</sup> and it is unfortunate that better proof was not made available to the court. Polish law does apparently admit the validity of such marriages — limiting to a strict minimum causes of nullity based on consanguinity or defective consent<sup>20</sup> — and such proof would, it is felt, have led to a clearer articulation of the grounds for the decision, which appears correct in the end result.<sup>21</sup> The law

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16. (1973), 2 O.R. (2d) 121; 42 D.L.R. (3d) 165; 14 R.F.L. 27

17. Van Camp J. also formulated the theory of Professor Cheshire (that of the intended matrimonial home) as involving a presumption that capacity is governed by the domiciliary law of the parties at the time of celebration, which could be rebutted by proof of intention to establish the home in a certain country, and establishment in fact in that country; *Feiner v. Demkowicz* (1973), 2 O.R. (2d) 121 at 126; 42 D.L.R. (3d) 165 at 170; 14 R.F.L. 27 at 32. This is in fact not the theory of Professor Cheshire but rather, the problem of intention aside, that which is being suggested in this note.

18. Further grounds of nullity relating to non-consummation and lack of consent were rejected. See the critical comment by F. Bates (1975), 53 Can. B. Rev. 359

19. It consisted only of evidence of the ceremony itself, a statement of the plaintiff that it was correct in Polish law, and “what purported to be translations of what was alleged to be part of the Polish marriage code” (*Feiner v. Demkowicz* (1973), 2 O.R. (2d) 121 at 127; 42 D.L.R. (3d) 165 at 171; 14 R.F.L. 27 at 33)

20. . Szer, “Droit de la famille” in S. Rozmaryn, ed., *Introduction à l'étude du droit polonais* (Warsaw, 1967) at 182-87; D. Lasok, *Polish Family Law* (Leyden: A. W. Sijthoff, 1968) at 45-59

21. To say this is not necessarily to deny the utility of a presumption in favour of the validity of marriages, as to which see A. Ehrenzweig and E. Jayme, 2 *Private International Law* (Dobbs Ferry: Oceana Publications, 1973) at 150-52;

applied was that of the jurisdiction wherein the parties intended to settle, and did settle, after the marriage was celebrated.

The existence of such different rules for different situations is, moreover, likely to result in a simplification, rather than in a complication, of the existing law. For in the measure that the law of a single jurisdiction comes to replace two previously existing personal laws, the difficult problem of the precise sphere of application of those laws will be avoided. Civilian lawyers would no longer need to enquire whether a prohibition was unilateral or bilateral, i.e., intended to contemplate only the spouse whose law contained it, or the other spouse as well.<sup>22</sup> Common law lawyers could avoid the problem of explaining decisions such as *Pugh v. Pugh*,<sup>23</sup> in which H and W, both of whom satisfied the conditions for marriage stipulated in their respective personal laws, were found incapable of marrying since W failed to meet the conditions of H's law. Given that it is the single law of the matrimonial home which applies, much present uncertainty as to the reach of the respective personal laws will have been removed.<sup>24</sup>

One further objection to this theory of the *established* matrimonial home should, however, be noted. It is of the slippery slope or thin-edge-of-the-wedge variety, to the effect that recognizing the role of the matrimonial home must also lead, intolerably, to recognition of a similar role for the law of all subsequently established matrimonial homes. Since marriages cannot be on-again, off-again institutions, any resort to other than

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*Staudingers Kommentar*, *supra*, note 6; J. Swan, *A New Approach to Marriage and Divorce in the Conflicts of Laws* (1974), 24 U.T.L.J. 17. Marriage remains, however, in the language of the American Restatement (2 *Restatement 2d Conflict of Laws* s. 283 at 234), a "matter of intense public concern" and this in itself will often suffice to rebut such a presumption, particularly where, as in *Feiner v. Demkowicz* (1973), 2 O.R. (2d) 121; 42 D.L.R. (3d) 165; 14 R.F.L. 27, the relation has dissolved *de facto* and there is considerable doubt as to the expectations of the parties at the time of celebration.

22. See generally H. Batiffol and P. Lagarde, 2 *Droit International Privé* (6th ed. Paris: Pichon et Durand-Auzias, 1976) at 37, who suggest that a law prohibiting the marriage of persons afflicted with certain illnesses should apply bilaterally, i.e. to invalidate the marriage of a healthy *ressortissant* of the enacting state to an afflicted foreigner.

23. [1951] P. 482; [1951] 2 All E.R. 680

24. It is perhaps justifiable to recall the concluding remark of Cumming-Bruce J. in *Radwan v. Radwan* (No. 2), [1973] Fam. 35 at 54; [1972] 3 W.L.R. 939 at 954; [1972] 3 All E.R. 1026 at 1040: "Having had the benefit of argument, I do not think that this branch of the law relating to capacity for marriage is quite as tidy as some very learned authors would have me believe . . . ."

pre-existing personal laws must therefore be excluded.<sup>25</sup> Interestingly, there have been decisions adopting the attitude that matrimonial capacity is tested by the personal law of the parties at the time of litigation<sup>26</sup> but this view, though it is generally accepted in determining the effects of marriage, does, it is felt, add an element of uncertainty which is undesirable. The conclusion does not follow, however, that the only remaining possibility is application of pre-existing personal laws. The circumstances of the case may point to application of the law of the established matrimonial home, but the requirements of security and certainty of legal relations are sufficient to reject the granting of any such role to after-acquired domiciles. The law of the first established domicile, and it alone, should govern. The most striking analogy is with the law of matrimonial regimes, recognized in many jurisdictions to be that of the matrimonial home, and unaffected by subsequent changes of domicile.<sup>27</sup> In English law, moreover, the case of *Radwan v. Radwan*<sup>28</sup> must be taken as authority for the rejection of the law of later-acquired domiciles, since there was no question therein of application of English law or the law of an after-acquired domicile.

Nor is it felt that there is any problem which arises from the fact that, with the solution here proposed, the validity of the marriage may be seen, erroneously, to be governed initially by pre-existing

25. J. H. C. Morris, *The Conflict of Laws* (London: Stevens & Sons, 1971) at 98

26. See the decision of the German *Reichsgericht* (*Entscheidungen des Reichsgerichts in Zivilsachen*, vol. 132, p. 416 — religious prohibition of Austrian law not applied to marriage in Russia of Austrian male and Russian female who four years later acquired Italian nationality) cited by Professor W. Wengler in his comment on *Schwebel v. Ungar*, [1965] S.C.R. 148; 48 D.L.R. (2d) 644 in (1965), 54 *Revue critique de droit international privé* 321; and the Quebec decision in *Varju v. Juhasz*, [1964] C.S. 636. The decision of the Supreme Court of Canada in *Schwebel v. Ungar* also indicates a willingness to permit the validity of acts affecting status (here divorce) to be determined by an after-acquired domicile, at least where the validity of the act is an incidental question in the resolution of a primary question governed by the law of the after-acquired domicile. Of interest in a related area are recent German decisions admitting the formal validity of marriages invalid by the *lex loci celebrationis* but formally valid by the law of a subsequently acquired nationality of the parties. See *Staudingers Kommentar*, *supra*, note 6 at 346. The results appear to correspond with the recommendations of Professor Maddaugh in matters of form; *supra*, note 6 at 139, 146

27. See Dicey and Morris, *supra*, note 1 at 647. There is English authority, moreover, for allowing the matrimonial regime to vary with changes of domicile (see Dicey and Morris, *supra*, note 1 at 647), but such flexibility seems inappropriate when the existence of the marriage is in question.

28. [1973] Fam. 35; [1972] 3 W.L.R. 939; [1972] 3 All E.R. 1026



personal laws and then, after fixing of the matrimonial domicile, by the law of that jurisdiction. Once the matrimonial home is fixed, its law will control the validity of the marriage as from its inception. If no such matrimonial home is established, *e.g.* because of the death of the parties or the prior *de facto* dissolution of the union, the personal laws remain operative.<sup>29</sup> Only in the rarest of cases, where adjudication was first necessary before the matrimonial home became fixed, can one envisage the possibility of different conclusions being reached as to the validity of the marriage. Such problems, and they are not absent in the traditional dual domicile theory, must simply be resolved through application of general principles of *res judicata* and the recognition of foreign judgments.<sup>30</sup>

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29. See, to this effect, C. Schmitthoff, *supra*, note 6 at 314

30. The Ontario Law Reform Commission has indicated the dangers of a *volte face* with the traditional approach. See Ontario Law Reform Commission, *7 Family Law Project Study* (Toronto: 1968) at 354, where the example is given of a marriage valid when celebrated according to Ontario choice of law rules but which is later annulled by a competent foreign court applying a different choice of law rule. The judgment should be recognized, according to normal rules of recognition of foreign judgments, but is one to reject today that which one yesterday accepted? Here the problem of the possible *volte face* flows from the intervention of a foreign court applying a different choice of law rule. With the theory being advanced in this note the problem could also flow from the forum's rule pointing to different jurisdictions depending upon the time of adjudication. In general, for purposes of legal certainty and the maintenance of the binding force of judgments, any prior adjudication fixing the status of the parties should be entitled to respect, whether the judgment be that of the forum or a competent foreign court. If the forum or a competent foreign court, prior to establishment of the matrimonial domicile, annuls or validates the marriage on the basis of pre-existing personal laws, this decision should be entitled to respect; nor does it generally appear appropriate to make use of the notion of a marriage valid "as far as yet appears" (See the *Duchess of Kingston's Case* (1776), 2 Smith, L.C. (13th ed.) 644 (H.L.); G. Spencer Bower and A. Turner, *The Doctrine of Res Judicata* (2nd ed. London: Butterworths, 1969) at 169-70), or "conditionally invalid" (See H. Hubbard, "Res Judicata in Matrimonial Causes" in 2 D. Mendes da Costa, ed., *Studies in Canadian Family Law* (Toronto: Butterworths, 1972) 695 at 735 ff.) On the other hand, decisions which simply authorize or refuse celebration appear of lesser consequence. A foreign decision refusing or authorizing celebration may be based on considerations other than that of the capacity of the parties and such decisions should best be seen as limited to the act of celebration, without any necessary implication for the validity of the marriage. Nor should a previous refusal of the courts of the forum to authorize celebration of the marriage in the forum be seen as necessarily implying the invalidity of a marriage subsequently celebrated elsewhere. Where, however, the courts of the forum have previously authorized celebration in the forum on the basis of capacity by pre-existing personal laws, subsequent settlement in a jurisdiction hostile to the marriage should not if it is felt, invalidate that which has been expressly authorized.

### *Conclusion*

Marriage is meant to be an enduring legal relationship. Yet a choice of law rule which rigidly refers the validity of marriage to the personal laws of the parties prior to celebration is one which totally ignores this temporal dimension of the institution, as well as any geographic mobility of the parties. Where the parties have in effect abandoned their pre-existing personal laws, and where this abandonment has become certain through the passage of time, our choice of law rules should reflect this very important circumstance. Adoption of the theory of the *established* matrimonial home will allow the discarding of abandoned personal laws, once this has become clearly established, without creating the uncertainty attendant on the creation of “non-rules” or a rule allowing the existence of the marriage to vary with each change of domicile.